

① Supreme Court U.S.
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**In The
Supreme Court of the United States**

RAMONITO BIONG ROBOCA,

Petitioner,

v.

ALBERTO R. GONZALES,
ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner, a native and citizen of the Philippines, was convicted in the United States District Court for knowingly and willfully possessing a false identification document with the intent to use that document to defraud the United States in violation of 18 U.S.C. § 1028(a)(4). The facts underlying this conviction show that Petitioner presented a false New York city birth certificate in conjunction with an application for a United States passport.

Both the administrative agency and the Federal Court of Appeals for the Ninth Circuit determined that the facts forming the basis for this conviction satisfied the government's burden that there was clear and convincing evidence to show that Petitioner was otherwise subject to removal from the United States under 8 U.S.C. § 1227(a)(3)(D) as an alien who falsely represented himself to be a citizen of the United States.

In arriving at this decision, the Ninth Circuit Court of Appeals failed to ascertain whether a uniform federal definition existed to determine when and if an alien has falsely claimed to be a United States citizen and whether the conduct forming the basis for Petitioner's conviction fell within the parameters of such a definition.

In light of these facts:

1. Did the Federal Appeals Court correctly determine that the underlying facts of Petitioner's conviction under 18 U.S.C. § 1028 was sufficient to support a charge of removability under 8. U.S.C. § 1227(a)(3)(D)?

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PETITION FOR WRIT OF CERTIORARI

Ramonito Biong Roboca, the Petitioner, respectfully prays that a writ of certiorari issue to review the opinion and order of the United States Court of Appeals for the Ninth Circuit entered in this case on July 6, 2005 and October 27, 2005, respectively.

OPINIONS BELOW

The opinion of the Board of Immigration Appeals (App. B hereto) is unreported. The slip opinion of the Ninth Circuit Court of Appeals on the merits (App. A hereto) – that is subject to review – is unreported. The order of the Ninth Circuit denying the petition for rehearing en banc in such case (App. C hereto) is unreported.

STATEMENT OF JURISDICTION

The judgement of the United States Court of Appeals for the Ninth Circuit (Appendix B) was entered on July 2005. A timely petition for rehearing en banc was denied on October 27, 2005. (Appendix C) The jurisdiction of the Supreme Court is invoked under Supreme Court Rule 10(c), in that the Ninth Circuit has decided an important federal question in a way that conflicts with relevant decisions of this Court.

RELEVANT PROVISIONS INVOLVED

Section 237(a)(3)(D)(i) of the Immigration and Nationality Act; 8 U.S.C. § 1227(a)(3)(D) provides in pertinent part:

In general - Any alien who falsely represents, or has falsely represented, himself to be a citizen of the United States for any purpose or benefit under this Act (including section 274A) or any Federal or State law is deportable

Section 212(i) of the Immigration and Nationality Act; 8 U.S.C. § 1182(i) provides in pertinent part:

"The Attorney General may, in the discretion of the Attorney General, waive the application of clause (i) of subsection (a)(6)(c) in the case of an immigrant who is the spouse, son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien. . . ."

STATEMENT

I. Nature of the Case

This is a petition for review of the decisions of the Board of Immigration Appeals ("Board") and the Ninth Circuit Court of Appeals finding Petitioner both removable under 8 U.S.C. § 1227(a)(3)(D) and ineligible to seek a waiver of inadmissibility under 8 U.S.C. § 1182(i).

II. Proceedings before the Immigration Court

Petitioner is a married male, native and citizen of the Philippines who entered the United States as a non-immigrant for visitor for pleasure on July 1990

through Los Angeles, California. Petitioner was subsequently convicted of knowingly and willfully possessing a false identification document with the intent to use that document to defraud the United States in violation of 18 U.S.C. § 1028(a)(4).

Upon execution of Petitioner's criminal sentence, the Bureau of Immigration and Customs Enforcement, which is a constituent part of the Department of Homeland Security, took the Petitioner into its custody. It then issued a Notice to Appear alleging that Petitioner was subject to removal from the United States.

The Notice to Appear alleged that Petitioner was a native and citizen of the Philippines and that he was admitted as a non-immigrant visitor on July 1990. The government also alleged that Petitioner remained beyond the period authorized under the terms of his non-immigrant visa. The government further contended that Petitioner falsely represented himself to be a citizen of the United States for the purpose of obtaining a United States passport.

Based on these factual allegations, the government charged Petitioner with removability for remaining in the United States longer than permitted under the terms of his visa in violation of 8 U.S.C. § 1227(a)(1)(B). Moreover, the government alleged that Petitioner falsely represented himself to be a United States citizen in violation of 8 U.S.C. § 1227(a)(3)(D).

Petitioner initially conceded that he remained in the United States beyond the terms of his visa. However, he denied the charge that he falsely represented himself to be a United States citizen. In a hearing conducted before an Immigration Judge on January 16, 2001, the Immigration

Judge sustained the charge of removability under 8 U.S.C. § 1227(a)(1)(B).

As to the government's charge of removability under 8 U.S.C. § 1227(a)(3)(D), the Immigration Judge in Arizona determined that section 1227(a)(3)(D) required that an individual sign or say that he is a citizen of the United States. The Immigration Judge stated that nowhere in the government's evidentiary material did it show that Petitioner specifically claimed to be a citizen of the United States. The Immigration Judge also noted that there was no attestation in the passport application itself stating that the applicant is a citizen of the United States.

The Immigration Judge took administrative notice that a United States passport can be issued to a national of the United States who is not a citizen and thus the submission of such an application with a false birth certificate without more could not sustain a charge that there has been a false claim to United States citizenship.

Petitioner then applied for adjustment of his status under 8 U.S.C. § 1255(a) so that he could obtain legal permanent residence on the basis of his marriage to a United States citizen. Moreover, he sought to obtain a waiver under 8 U.S.C. § 1182(i). The proceedings before the Immigration Court were then transferred to San Francisco, California since Petitioner eventually bonded out of government custody.

In a hearing conducted on May 1, 2002, an Immigration Judge in San Francisco, California disagreed with the prior Immigration Judge's ruling. Instead, the Immigration Judge in San Francisco agreed with the government and sustained the government removal charge under section 1227(a)(3)(D). In doing so, the Immigration Judge

denied Petitioner's applications for adjustment of status and a waiver of inadmissibility under 8 U.S.C. § 1182(i), since the determination that Petitioner falsely claimed to be a citizen precluded the Petitioner from seeking both forms of discretionary relief. Petitioner then appealed the decision to the Board.

III. Proceedings before the Board of Immigration Appeals

Before the Board, Petitioner detailed the allegations of error in the Immigration Judge's ruling. The government filed its response brief arguing in support of the Immigration Judge's decision. The Board, on October 2003, upheld the decision of the Immigration Judge and dismissed Petitioner's appeal. Petitioner timely filed a petition for review with the Ninth Circuit Court of Appeals.

IV. Statement of Facts

Petitioner is a married male, native and citizen of the Philippines. On March 27, 1992, Petitioner married Ms. Elizabeth Jumamil Pabingwit, a United States citizen. In 1995, Petitioner and his spouse purchased a home in Santa Clara, California. Together they have two United States citizen children. The Petitioner is the primary caretaker for the children. Petitioner's spouse is employed full time for Siliconix Inc. as a wafer fabrication specialist.

Prior to entering the United States, Petitioner worked as a chemical engineer for a mining and petroleum company. In the United States, the Petitioner has been employed as a warehouseman and plant engineer. He eventually left his position as a plant engineer to work at home and manage his investments.

In 1997, Petitioner's father passed away. Petitioner, however, was not able to attend his father's funeral. On August 25th, 1999, Petitioner executed an application for a United States passport at the United States Post Office in Santa Clara, California. He used the name of "Ramonito Biong Roboca." In conjunction with this application, Petitioner attached a certified copy of a New York City certificate of birth and a California Department of Motor Vehicle's driver's license.

On December 9, 1999, an agent of the State Department referred both the application and supporting materials to the Fraud program manager at the United States Passport Agency since the agent discovered that the certificate of birth was counterfeit. The investigation culminated in the filing of criminal charges against Petitioner. A warrant for Petitioner's arrest issued and on December 22, 1999, government agents arrested the Petitioner.

Petitioner eventually plead guilty to a violation of 18 U.S.C. § 1028(a)(4)(i), in that he willfully possessed a false identification document with the intent to defraud the United States. He was convicted of this offense as a Class A misdemeanor. The District Court imposed a sentence of 24 months probation. The Court did not impose a sentence to imprisonment.

The State Department's Office of Diplomatic Security referred the matter to the attention of the Bureau of Immigration and Customs Enforcement, a constitute part of the Department of Homeland Security. Bureau agents arrested the Petitioner and placed him into removal proceedings. The agency charged that Petitioner was subject to removal from the United States as articulated

above. Petitioner is currently under a final administrative order requiring his departure from the United States.

V. Statement of the Court of Appeals and Supreme Court Jurisdiction

The Ninth Circuit Court of Appeals properly exercised jurisdiction under 8 U.S.C. § 1252 since it reviewed a final administrative order requiring Petitioner to depart the United States. Venue was also proper in the Ninth Circuit under the same statute in that the judicial proceedings were completed by the Immigration Judge sitting in San Francisco, California in the Ninth Circuit.

The jurisdiction of this Court on application for writ of certiorari is invoked under U.S. Supreme Court Rule 10(c), as set forth above. That is, the petition for certiorari presents a substantial question for the reason that the Ninth Circuit Court of Appeals has an important federal question in a way that conflicts with relevant decisions of this Court.

The question to be resolved is whether the Ninth Circuit Court of Appeals could have properly determined that an alien violated 8 U.S.C. § 1227(a)(3)(D) without ascertaining whether a uniform federal definition existed to determine when and if an alien has falsely claimed to be a United States citizen and whether the conduct forming the basis for Petitioner's conviction fell within the parameters of such a definition. This Court's precedent and the precedent of the Federal Circuit Courts of Appeals has stressed the importance of developing uniform federal standards in the application of this country's federal statutes.

The Ninth Circuit's opinion completely sidesteps this issue. The effects of the Ninth Circuit's decision are significant. First, the methodology the Ninth Circuit employed to determine that Petitioner was subject to removal under section 1227(a)(3)(D) allows for inconsistent determinations. Without a uniform federal standard to ascertain when an alien has falsely represented himself to be a United States citizen, there will be inconsistent decisions regarding this issue not only from the Ninth Circuit Court of Appeals but also between the various Federal Circuit Appeal Courts and within the agency itself.

Second, this type of approach threatens thousands of aliens with removal without the ability to defend against it. Third, there are significant and adverse consequences for an alien if an agency determines that an alien has falsely claimed to be a citizen of the United States. Under such circumstances, an alien will lose their ability to seek discretionary relief. Moreover, aliens in Petitioner's position, who seek admission into the United States as legal permanent residents based on their marriage to a United States citizen, are permanently barred from admission. Therefore, family members who are United States citizens are negatively affected. As such, great care must be exercised in ascertaining an alien's removability under section 1227(a)(3)(D). Such care can only be accomplished if a uniform federal standard exists to ascertain when an alien has in fact violated the terms of this statute. A case of this importance deserves review by the Supreme Court.

REASONS FOR GRANTING THE WRIT

- I. \ **The Federal Appeals Court incorrectly determined that the underlying facts of Petitioner's conviction under 18 U.S.C. § 1028 was sufficient to support a charge of removability under 8. U.S.C. § 1227(a)(3)(D)**

8 U.S.C. § 1227(a)(3)(D) provides that “[a]ny alien who falsely represents, or has falsely represented, himself to be a citizen of the United States for any purpose or benefit under this Act . . . or any Federal or State law is deportable” A violation of this section need not be based on a criminal conviction. Section 1227(a)(3)(D) does not define what form of conduct constitutes a false claim to United States citizenship. Moreover, Congress broadly worded the statute to cover a variety of situations where an alien makes a false representation for the purpose of securing some benefit under the Immigration and Nationality Act or Federal or State law.

To determine whether Petitioner is subject to removal under section 1227(a)(3)(D), one “ . . . must . . . start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used . . . ” within 8 U.S.C. § 1227(a)(3)(D). *INS v. Elias Zacharias*, 502 U.S. 478, 482 (1992) (quoting *Richards v. United States*, 369 U.S. 1, 9 (1962)). “The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole,” and not by looking at statutory terms in isolation. *Robinson v. Shell Oil Co.*, 117 S.Ct. 843, 846 (1997). It is also a cardinal principle that a statute is to be read as a whole since the meaning of the statutory language depends on context. *Conroy v. Aniskoff*, 507 U.S. 511, 514 (1993).

The plain language of section 1227(a)(3)(D) does not provide a specific definition of what constitutes a false claim to United States citizenship. Thus, it lacks a definitive framework through which a court can adequately examine an alien's conduct in order to determine whether such alien is subject to deportation under this provision.

This is especially true in light of this statute's broad approach in incorporating potential violations of various state and federal statutes as forming the basis for removability under this provision. Thus, a myriad of factual scenarios exist that may subject an alien to removability under section 1227(a)(3)(D).

In *Taylor v. United States*, 495 U.S. 575 (1999), a criminal defendant challenged his sentence enhancement under the Career Criminals Act of 1996. This legislation provided for a sentence enhancement if a defendant has three prior convictions for certain specified offenses – including Burglary. *Id.* This Court did not decide whether the defendant's conviction was a "Burglary". Rather, it held that such a question could not be answered by looking at the definition of Burglary adopted by a particular state since that would lead to disparate consequences. *Id.* at 590-92.

This Court, however, determined that the term "Burglary" "... must have some uniform definition independent of the labels employed by the various state criminal codes ..." *Id.* at 592. This Court then looked to various state statutes and settled on a uniform definition for the term Burglary as the "unlawful or unprivileged entry into or remaining in a building or structure with the intent to commit a crime ..." *Id.* This Court then held that a defendant did not commit a Burglary for purposes of the

Career Criminals Act unless the offense at issue met the uniform definition. *Id.* at 598-99. In reaching this holding, this Court emphasized that, absent any plain indication to the contrary, federal laws are not to be construed so that their application is dependent on state law. *Id.*

Animated by this decision, the federal courts have stressed that "... the concerns of uniformity that motivated [this Court] ... in *Taylor* are equally strong in the immigration context ..." *Ye v. INS*, 214 F.3d 1128 (9th Cir. 2000). The Ninth Circuit Court of Appeals repeatedly recognized that the immigration laws must be uniformly applied across the country without regard to the nuances of state law. *Id.*; see also *Khan v. INS*, 36 F.3d 1412, 1414 (9th Cir. 1994) ("The INA was designed to implement a uniform federal policy, and the meaning of concepts important to its application are not to be determined according to the law of the forum, but rather require[] a uniform federal policy definition."). This approach is consistent with the judicial recognition that federal law must control in the enforcement of our immigration laws. See *Aguirre v. INS*, 79 F.3d 315 (2nd Cir. 1996); *Yanez-Popp v. INS*, 998 F.2d 231 (4th Cir. 1993)

Since section 1227(a)(3)(D) is devoid of a definition describe a false claim to United States citizenship, there is a need to adopt a uniform federal standard for this provision. There are three principle sources under which one can draw a uniform federal definition for falsely representing oneself to be a citizen of the United States. They include the Model Penal Code, the common law and federal statutes. Both the Model Penal Code and the common law do not provide for a definition for this term. Federal law,

however, does criminalize such conduct and it has been a creature of federal law for more than one hundred years.

Congress originally imposed sanctions for false claims to United States citizenship in 1870, when it enacted 18 U.S.C.A. § 141. The heading of this provision was "falsely claiming citizenship". It made liable to find and imprisonment any person who "for any fraudulent purpose whatever, shall falsely represent himself to be a citizen of the United States. . . ." Congress later re-codified this provision under 8 U.S.C.A. § 746(a) and it enacted this provision as part of the Immigration and Nationality Act of 1940.

Section 746(a) contained some thirty-four numbered subdivisions that related to offenses concerning naturalization proceedings, citizenship status, and the control of aliens in the United States. This provision "... represent[ed] for the most part a codification in one place in the Nationality Act of 1940 ... offenses formally scattered in various places." *United States v. Achtner*, 144 F.2d 49 (2nd Cir. 1944). Subsection 18 of U.S.C.A. § 746(a) made it a felony for any alien to "knowingly and falsely represent himself to be a citizen of the United States without having been naturalized or admitted to citizenship, or without otherwise being a citizen of the United States. This provision was a "substantial re-enactment of the repealed 18 U.S.C.A. [Sec.] 141, originally passed in 1870 . . ." *Id.* (text modified)

In analyzing both provisions, the federal courts uniformly held that these statutes placed no limitation upon the circumstances which the false representation was made, as long as it was for a fraudulent purpose. *Id.* at 51. Congress' intent when it passed this provision

"... was ... to extend, rather than reduce, the coverage, as well as the penalties, of the prior law, for the latter statute was part of the Nationality Act of 1940, a national defense measure enacted in the face of impending war to help tighten controls over the conduct of aliens in this country." *Id.* at 51.

Congress later re-codified section 746(a) under 18 U.S.C. § 911, which provides that "[w]hoever falsely and willfully represents himself to be a citizen of the United States shall be fined under this title or imprisoned not more than three years or both ... " 18 U.S.C. § 911.¹ Section 911 "has three identified elements. First, a defendant must falsely claim to be a U.S. citizen" *United States v. Romero Avila*, 2000 U.S. App. Lexis 7761 (9th Cir. April 26, 2000). "Second, the misrepresentation must be willful." *Id.* "Third, the misrepresentation must be made to someone with good reason to inquire into a defendant's citizenship ... ". *Id.*

"The first two elements come from the language of the statute itself. The third element derives from [] case law." *Id.* (citing *Smiley v. United States*, 181 F.2d 505, 507-08 (9th Cir. 1950)). With respect to the first element, several circuit decisions have applied a strict approach in interpreting what conduct constitutes a false claim to citizenship under former section 746(a)(18) and 18 U.S.C.A. § 141.

¹ Congress separated former 18 U.S.C.A. § 746(a) into various statutes concerning fraud relating to Naturalization and other matters. See, e.g., 18 U.S.C. § 1002 (possession of false papers to defraud the United States); 18 U.S.C. § 1015 (naturalization, citizenship or alien registry); 18 U.S.C. § 1028 (fraud and related activity in connection with identification documents).

In *Smiley v. United States*, *supra*, Los Angeles police arrested a defendant and then questioned him in order to obtain additional information. During the interrogation, the defendant answered "yes" to the question "citizen". The government argued that this answer when taken together with a further answer to the word "nativity" appearing on the registration card a "N.Y." was sufficient to "infer" that the defendant falsely claimed to be a citizen of the United States. *Id.* The Ninth Circuit rejected the government's contention and held that the evidence was insufficient to support a finding that the government satisfied the first element of the offense. *Id.*

In *United States v. Franklin*, 188 F.2d 182 (7th Cir. 1951), agents of the Federal Bureau of Investigation arrested an alien defendant concerning his connection with a distributor of Russian motion picture films. *Id.* The defendant was eventually charged with seven criminal counts. Six of these counts related to falsely representing himself to be a United States citizen. *Id.* With respect to the first count, the government alleged that in an interview with federal agents, an agent asked the defendant where he was born. The defendant responded by saying "New York City". In the fifth count, the government alleged that the defendant represented that he was born in New York City on an employment application. *Id.* The Seventh Circuit eventually overturned defendant's convictions on count one and five reasoning that the "evidence offered by the government . . . were not sufficient misrepresentation[s] under the law to sustain a conviction. . . ." *Id.* at 188. The court did sustain the conviction on the remaining counts noting that the evidence contained both verbal and written statements from the defendant specifically indicating that he was a citizen of the United States. *Id.*

Likewise, the Third Circuit in *United States v. Anzalone* 197 F.2d 714 (3rd Cir.) overturned a defendant's conviction for falsely claiming to be a citizen of the United States since the defendant "represented only that he was the individual who registered [to vote], that he had not been removed from the voting district, and that he had not violated any Pennsylvania law prohibiting bribery . . .". *Id.*

The above cases show that an alien defendant must make either a verbal or written assertion that they are a citizen of the United States. Evidence that only provides an inference that an alien falsely represented himself to be a United States citizen is insufficient to prove the first element of the statute under 18 U.S.C. § 911.

While the above decisions were bound to interpret 18 U.S.C. § 911 and its predecessor statutes in accordance with the maxim of statutory construction that criminal statutes should be interpreted narrowly; this same principle nevertheless applies in interpreting section 1227(a)(3)(D) since this Court has long held a judicial philosophy to interpret deportation statutes narrowly. *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948). As this Court explained, "deportation is a drastic measure . . ." and "since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used . . ." *Id.*

Petitioner's conduct underlying the basis for his conviction does not fall within the applicable federal definition.

Petitioner's conduct surrounding his conviction does not fall within the above ascribed definition for falsely

claiming United States citizenship. To prove a violation of section 1227(a)(3)(D), the government must establish by clear and convincing evidence that Petitioner is deportable. 8 U.S.C. § 1229(a)(c)(3)(A); *see also Morissette v. United States*, 342 U.S. 246, 263 (1952)

Here, Petitioner signed a passport application that did not contain a direct inquiry of whether he was a citizen of the United States. While Petitioner indicated that he was born in the United States, this alone is legally insufficient to constitute a false claim to United States citizenship. Furthermore, the false birth certificate by itself represented that he was born in Queens, New York and was not a specific misrepresentation of United States citizenship. *See United States v. Franklin*, 188 F.2d 182 (7th Cir. 1951) (evidence offered by the government that defendant represented to FBI agents and in an application for employment that he was born in the United States was not legally sufficient to sustain prosecution under 8 U.S.C. § 746(a)(18); *Duncan v. United States*, 68 F.3d 136, 141 (9th Cir. 1993) (Defendant's false statement on passport application indicating birth in Camden, New Jersey coupled with false birth certificate not legally sufficient to sustain prosecution); *contra United States v. Rodrigues-Serrate*, 534 F.2d 7 (1st Cir. 1976) (affirming conviction under 18 U.S.C. § 911 where defendant presented a false Puerto Rican birth certificate). The Ninth Circuit Court of Appeals, therefore, incorrectly determined that Petitioner was subject to deportation under section 1227(a)(3)(D).

CONCLUSION

Petitioner respectfully submits that the Ninth Circuit erred in the following respects:

* The Ninth Circuit Court of Appeals failed to ascertain whether a uniform federal definition existed to determine if Petitioner's conduct constituted a false claim to United States citizenship under 8 U.S.C. § 1227(a)(3)(D). This approach is inconsistent with the precedent of this Court and of several Circuit Courts of Appeal, which have routinely sought to apply a uniform federal standard in order to ascertain the deportability provisions of the Immigration and Nationality Act.

* Due to the failure to ascertain and apply the federal definition for false citizenship claims, the Court incorrectly determined that Petitioner was deportable under 8 U.S.C. § 1227(a)(3)(D).

* Because of the above, the Court erroneously concluded that Petitioner did not qualify for relief under 8 U.S.C. § 1255(a) and 8 U.S.C. § 1182(i).

Therefore, Petitioner respectfully prays that this Court grant this petition for writ of certiorari, reverse the decisions of the Ninth Circuit Court of Appeals and the Board, hold that Petitioner's offense does not constitute a false claim to United States citizenship under 8 U.S.C. § 1227(a)(3)(D) and otherwise hold that Petitioner is eligible for a hearing on relief under 8 U.S.C. § 1255(a) and 8 U.S.C. § 1182(i).

Respectfully submitted,

BRIAN H GETZ
Counsel of Record

APPENDIX A
NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

RAMONITO BIONG
ROBOCA,

Petitioner,

v.

ALBERTO R. GONZALES,**
Attorney General,
Respondent.

No. 03-74077

Agency No. A78-181-308

MEMORANDUM*

On Petition for Review of an Order of the
Board of Immigration Appeals

Argued and Submitted June 16, 2005
San Francisco, California

Before: SCHROEDER, Chief Judge, CANBY and HAWKINS, Circuit Judges.

Ramonito Biong Roboca petitions for review of the Board of Immigration Appeals's ("BIA's") decision finding him removable for (1) overstaying his temporary visa and (2) making a false claim of citizenship. The government

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** Alberto R. Gonzales is substituted for his predecessor, John Ashcroft, as Attorney General of the United States, pursuant to Fed. R. App. P. 43(c)(2).

App. 2

having exercised its discretion to charge petitioner in a way that compels inadmissibility and ineligibility for waiver of inadmissibility, we deny the petition for review.

“Any alien who falsely represents, or has falsely represented, himself to be a citizen of the United States for any purpose or benefit under this Act . . . or any Federal or State law” is deportable, 8 U.S.C. § 1227(a)(3)(D), and inadmissible. 8 U.S.C. § 1182(a)(6)(C)(ii). Roboca’s conviction under 18 U.S.C. § 1028(a)(4) for “knowingly and willfully possessing a false identification document . . . with the intent to use that document to defraud the United States,” together with his statements in his plea agreement that he applied for a United States passport with a birth certificate he knew to be false, in order to obtain the passport, and his sworn testimony before the IJ that he falsely represented himself to be a United States citizen to obtain the passport, establish a false claim of citizenship under § 1227(a)(3)(D) and § 1182(a)(6)(C)(ii). There is no waiver of inadmissibility for falsely claiming citizenship. See 8 U.S.C. § 1182(I); *Pichardo v. INS*, 216 F.3d 1198, 1201 (9th Cir.2000).

PETITION DENIED.

APPENDIX B

U.S. Department of Justice
Executive Office for
Immigration Review

Decision of the Board of
Immigration Appeals

Falls Church, Virginia 22041

File: A78 181 308 - San Francisco Date: Oct. 8, 2003

In re: **RAMONITO BIONG ROBOCA**
a.k.a. Ramonito Bong [sic] Roboca

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Martin Resendez
Guajardo, Esquire

ON BEHALF OF DHS: Frederick E. Newman
Assistant District Counsel

CHARGE

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C.
§ 1227(a)(1)(B)] – In the United States in
violation of law

Sec. 237(a)(3)(D), I&N Act [8 U.S.C.
§ 1227(a)(3)(D)] – False claim of United
States citizenship

APPLICATION: Adjustment of status; waiver of inad-
missibility under section 212(i)

ORDER:

PER CURIAM. The respondent is a native and citizen of the Philippines. He appeals the Immigration Judge's May 1, 2002, decision denying his application for adjustment of status under section 245 of the Immigration and Nationality Act, 8 U.S.C. § 1255(a), and his application for

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We affirm the decision of the Immigration Judge with the following additions. See *Matter of Burbano*, 201 I&N Dec. 872, 874 (BIA 1994) (noting that adoption or affirmation of a decision of an Immigration Judge, in whole or in part, is "simply a statement that the Board's conclusions upon review of the record coincide with those the Immigration Judge articulated in his or her decision"). On appeal, the respondent argues that presenting a "false U.S. citizen birth certificate," in an attempt to obtain a United States passport, does not constitute the false representation of citizenship under section 237(a)(3)(D) of the Act. The respondent avers that he must specifically state or indicate that he is a United States citizen in order to be removable under such section. However, we agree with the Immigration Judge that the respondent's submission of a false United States birth certificate, in order to obtain a United States passport, is sufficient to support a finding of removability under section 237(a)(3)(D) of the Act.

We note that the United States Court of Appeals for the Ninth Circuit, in which jurisdiction the instant case arises, upheld a board decision finding an alien to have made a false claim to United States citizenship when he used a false birth certificate to try to enter the United States. See *Pichardo v. INS*, 216 F.3d 1198, 1201 (9th Cir. 2000). Although the alien in *Pichardo v. INS* was convicted of making a false claim of citizenship, under 18 U.S.C. § 911, and the respondent here has not been convicted under such section, the act committed (presenting a false United States birth certificate) in both cases is the same. *Id.* In sum, we find that the production of a false United States birth certificate to federal authorities constitutes a false representation that the respondent has

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been born in the United States and is consequently a United States citizen. Although of a slightly different order than making a specific oral or written statement concerning such claim, it has precisely the same effect. Thus, we agree with the Immigration Judge's decision and reasoning in the instant case.

Accordingly, the respondent's appeal is dismissed.

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the respondent is permitted to voluntarily depart from the United States, without expense to the Government, within 30 days from the date of this order or any extension beyond that time as may be granted by the district director. *See* section 240B(b) of the Immigration and Nationality Act; 8 C.F.R. § 1240.26(c), (f). In the event the respondent fails to so depart, the respondent shall be removed as provided in the Immigration Judge's order.

NOTICE: If the respondent fails to depart the United States within the time period specified, or any extensions granted by the district director, the respondent shall be subject to a civil penalty of not less than \$1,000 and not more than \$5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Immigration and Nationality Act. *See* section 240B(d) of the Act.

/s/ Neil P. [Illegible]

FOR THE BOARD

APPENDIX C
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RAMONITO BIONG RO-
BOCA,

Petitioner,

v.

ALBERTO R. GONZALES,*
Attorney General,

Respondent.

No. 03-74077

Agency No. A78-181-308

ORDER

(Filed Oct. 27, 2005)

Before: SCHROEDER, Chief Judge, CANBY and HAWKINS, Circuit Judges.

The panel has voted to deny the petition for rehearing. Chief Judge Schroeder and Judge Hawkins have voted to deny the petition for rehearing en banc and Judge Canby has recommended denying the en banc petition.

The full court has been advised of the petition for rehearing en banc and no Judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are DENIED.

* Alberto R. Gonzales is substituted for his predecessor, John Ashcroft, as Attorney General of the United States, pursuant to Fed. R. App. P. 43(c)(2).

APPENDIX D
ENTRY AND EXCLUSION

8 U.S.C. § 1227

* * *

(D) Falsely claiming citizenship

(i) In general

Any alien who falsely represents, or has falsely represented, himself to be a citizen of the United States for any purpose or benefit under this chapter (including section 1824a of this title) or any Federal or State law is deportable.

(ii) Exception

In the case of an alien making a representation described in clause (i), if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of making such representation that he or she was a citizen, the alien shall not be considered to be deportable under any provision of this subsection based on such representation.

(4) Security and related grounds

(A) In general

Any alien who has engaged, is engaged, or at any time after admission engages in -

(i) any activity to violate any law of the United States relating to espionage or sabotage or to violate or evade any law prohibiting the export

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from the United States of goods, technology, or sensitive information,

(ii) any other criminal activity which endangers public safety or national security, or

(iii) any activity a [sic] purpose of which is the opposition to, or the control or overthrow of, the Government of the United States by force, violence, or other unlawful means, is deportable.

(B) Terrorist activities

Any alien who has engaged, is engaged, or at any time after admission engages in any terrorist activity (as defined in section 1182(a)(3)(B)(iv) of this title) is deportable.

(C) Foreign policy

(i) In general

An alien whose presence or activities in the United States the Secretary of State has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the United States is deportable.

(ii) Exceptions

The exceptions described in clauses (ii) and (iii) of section 1182(a)(3)(C) of this title shall apply to deportability under clause (i) in the same manner as they apply to inadmissibility under section 1182(a)(3)(C)(i) of this title.

(D) Participated in Nazi persecution, genocide, or the commission of any act of torture or extrajudicial killing

Any alien described in clause (i), (ii), or (iii) of section 1182(a)(3)(E) of this title is deportable.

(E) Recipient of military-type training²

(i) In general

Any alien who has received military-type training from or on behalf of any organization that, at the time the training was received, was a terrorist organization (as defined in subclause (I) or (II) of section 1182(a)(3)(B)(vi) of this title), is deportable.

(ii) Definition

As used in this subparagraph, the term "military-type training" includes training in means or methods that can cause death or serious bodily injury, destroy or damage property, or disrupt services to critical infrastructure, or training on the use, storage, production, or assembly of any explosive, firearm, or other weapon, including any weapon of mass destruction (as defined in section 2332(c)(2) of Title 18).

(E) Participated in the Commission of severe violations of religious freedom²

Any alien described in section 212(a)(2)(G) is deportable.

(5) Public charge

Any alien who, within five years after the date of entry, has become a public charge from causes not affirmatively shown to have arisen since entry is deportable.

(6) Unlawful voters

(A) In general

Any alien who has voted in violation of any Federal, State, or local constitutional provision, statute, ordinance, or regulation is deportable.

(B) Exception

In the case of an alien who voted in a Federal, State, or local election (including an initiative, recall, or referendum) in violation of a lawful

* * *

8 U.S.C. § 1182

**(i) Admission of immigrant inadmissible for fraud
or willful misrepresentation of material fact**

(1) The Attorney General may, in the discretion of the Attorney General, waive the application of clause (i) of subsection (a)(6)(C) of this section in the case of an immigrant who is the spouse, son, or daughter of a United States citizen or of an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien or, in the case of an alien granted classification under clause (iii) or (iv) of section 1154(a)(1)(A) of this title or clause (ii) or (iii) of section 1154(a)(1)(B) of this title, the alien demonstrates extreme hardship to the alien or the alien's United States citizen, lawful permanent resident, or qualified alien parent or child.

* * *

APPENDIX E

ROBERT S. MUELLER III
United States Attorney
Attorney for Plaintiff

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,) Criminal No.
Plaintiff,) CR 00 30256
v.) VIOLATIONS:
RAMONITO BIONG ROBOCA,) 18 U.S.C. § 1028(a)(4)
Defendant.) - Possessing False
) Identification
) Documents to Defraud
) the United States
) SAN JOSE VENUE

INFORMATION

(Filed Dec. 30, 1999)

The United States Attorney charges:

COUNT ONE: (18 U.S.C. § 1028(a)(4))

On or about August 25, 1999, in the County of Santa Clara, Northern District of California, the defendant

RAMONITO BIONG ROBOCA

did knowingly and willfully possess a false identification document with the intent to use that document to defraud the United States, all in violation of Title 18, United States Code, Section 1028(a)(4).

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DATED: 12-29-97

ROBERT S. MUELLER, III
United States Attorney

/s/ [Illegible] _____

AMBER ROSEN

Acting Chief; San Jose Branch

(Approved as to form: /s/ [Illegible] _____)

AUSA Goldstein

APPENDIX F

ROBERT S. MUELLER, III (CSBN 59775)
United States Attorney

DAVID W. SHAPIRO (NYSB 2054054)
Chief, Criminal Division

YONKEL GOLDSTEIN (CSBN 136169)
Assistant United States Attorney

280 South First Street, Ste. 371
San Jose, California 95113
Telephone: (408) 535-5056

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

UNITED STATES OF AMERICA,)	No.CR 99 20256 PVT
Plaintiff,)	PLEA AGREEMENT
)	
v.)	
)	
RAMONITO BIONG ROBOCA,)	
)	
Defendant.)	

I, RAMONITO BIONG ROBOCA, and the United States Attorney's Office for the Northern District of California (hereafter "the government") enter into this written plea agreement (the "Agreement") pursuant to Rule 11(e)(1)(B) of the Federal Rules of Criminal Procedure:

The Defendant's Promises

1. I agree to plead guilty to Count One of the captioned information charging me with possessing a false

identification document to defraud the United States, in violation of 18 U.S.C. § 1028(a)(4). I agree that the elements of the offense and the maximum penalties are as follows: (1) knowingly and willfully possessing a false identification document (2) with the intent to use that document to defraud the United States.

- | | |
|------------------------------------|-----------|
| a. Maximum prison sentence | 1 year |
| b. Maximum fine | \$100,000 |
| c. Maximum supervised release term | 1 year |
| d. Mandatory special assessment | \$25.00 |

2. I agree that I am guilty of the offense to which I will plead guilty, and I agree that the following facts are true: On August 25, 1999 I submitted an application for a United States passport at a Post Office in Santa Clara, California. In support of that application I also submitted a certified copy of a New York City birth certificate, indicating that I was born on September 1, 1955 in Queens, New York. That was not my true birth certificate and I knew it was not my true birth certificate at the time that I submitted it. In fact, I was born on August 31, 1955 in the Philippines. I submitted the false birth certificate in order to obtain a United States passport.

3. I agree to give up all rights that I would have if I chose to proceed to trial, including the rights to a jury trial with the assistance of an attorney; to confront and cross-examine government witnesses; to remain silent or testify; to move to suppress evidence or raise any other Fourth or Fifth Amendment claims; to any further discovery from the government; and to pursue any affirmative defenses and present evidence.

4. I agree to give up my right to appeal my conviction, the judgment, and orders of the Court. I also agree to waive any right I may have to appeal my sentence.

5. I agree not to file any collateral attack on my conviction or sentence, including a petition under 28 U.S.C. §2255, at any time in the future after I am sentenced, except for a claim that my constitutional right to the effective assistance of counsel was violated.

6. I agree not to ask the Court to withdraw my guilty plea at any time after it is entered.

7. I agree that the Sentencing Guidelines should be calculated as follows, and that I will not ask for any other adjustments to or reductions of the offense level:

a. Base Offense Level, U.S.S.G. § 2L2.2:	8
b. Specific offense characteristics:	0
d. Increase/decrease for role in the offense:	0
e. Acceptance of responsibility: (if I meet the requirements of U.S.S.G. § 3E1.1)	-2
f. Adjusted offense level	6

I agree that, regardless of any other provision in this agreement, the government may and will provide to the Court and the Probation Office all information relevant to the charged offenses or the sentencing decision. I also agree that the Court is not bound by the Sentencing Guidelines calculations above, the Court may conclude that a higher guideline range applies to me, and, if it does, I will not be entitled, nor will I ask, to withdraw my guilty plea.

8. I agree that, before or after sentencing, I will, upon request of the Court, the government, or the U.S.

Probation Office, provide accurate and complete financial information, release funds and property under my control, submit sworn statements and give depositions under oath concerning my assets and my ability to pay, surrender assets I obtained as a result of my crimes, and make a good faith effort to pay amounts I am ordered to pay as a fine, forfeiture, or restitution. I agree to pay the special assessment at the time of sentencing.

9. I agree not to commit or attempt to commit any crimes before sentence is imposed or before I surrender to serve my sentence. I also agree not to violate the terms of my pretrial release; intentionally provide false information to the Court, the Probation Office, Pretrial Services, or the government; or fail to comply with any of the other promises I have made in this Agreement. I agree that, if I fail to comply with any promises I have made in this Agreement, then the government will be released from all of its promises below, but I will not be released from my guilty plea.

10. I agree that this Agreement contains all of the promises and agreements between the government and me, and I will not claim otherwise in the future.

11. I agree that this Agreement binds the U.S. Attorney's Office for the Northern District of California only, and does not bind any other federal, state, or local agency.

The Government's Promises

12. The government agrees not to file or seek any additional charges that could be filed as a result of the investigation that led to the captioned information.

13. The government agrees to recommend the Guidelines calculations set out above and to recommend probation if the defendant is eligible for probation under the Guidelines.

The Defendant's Affirmations

14. I confirm that I have had adequate time to discuss this case, the evidence, and this Agreement with my attorney, and that he has provided me with all the legal advice that I requested.

15. I confirm that while I considered signing this Agreement, and at the time I signed it, I was not under the influence of any alcohol, drug, or medicine.

16. I confirm that my decision to enter a guilty plea is made knowing the charges that have been brought against me, any possible defenses, and the benefits and possible detriments of proceeding to trial. I also confirm that my decision to plead guilty is made voluntarily, and no one coerced or threatened me to enter into this agreement.

Dated: _____

RAMONITO BIONG ROBOCA
Defendant

ROBERT S. MUELLER, III
United States Attorney

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Dated: _____

YONKEL GOLDSTEIN
Assistant United States
Attorney

I have fully explained to my client all the rights that a criminal defendant has and all the terms of this Agreement. In my opinion, my client understands all the terms of this Agreement and all the rights he is giving up by pleading guilty, and, based on the information now known to me, his decision to plead guilty is knowing and voluntary.

Dated: _____

DENNIS ALAN LEMPert
Attorney for Defendant

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APPENDIX G

**UNITED STATES DISTRICT COURT
Northern District of California**

(Filed Apr. 24, 2000)

**UNITED STATES
OF AMERICA**

V.

**Case Number:
CR99-20256 PVT**

**Ramonito Biong Roboca
Defendant**

**JUDGMENT IN A CRIMINAL CASE
(For Offense(s) Committed On or After
November 1, 1987)**

The defendant, RAMONITO BIONG ROBOCA, was represented by DENNIS LEMPert & JAIME HARMON.

The defendant pleaded guilty to count(s) 1. Accordingly, the defendant is adjudged guilty of the following count(s), involving the indicated offense(s):

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Count Number(s)</u>
18:1028	Possessing False Identification Documents To Defraud The United States	1

As pronounced on April 6, 2000, the defendant is sentenced as provided in pages 2 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of \$25.00, for count(s) 1, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 24 day of April, 2000.

/s/ Patricia V. Trumbull
PATRICIA V. TRUMBULL
U.S. MAGISTRATE JUDGE

Defendant's SSAN: 621-38-6921

Defendant's Date of Birth: 08/31/55

Defendant's address: 4483 Cheeney Street, Santa Clara,
CA, 95054

PROBATION

The defendant is hereby placed on probation for a term of 24 month(s).

While on probation you shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. Revocation of probation is mandatory for possession of a controlled substance.

You shall pay the assessment imposed in accordance with 18 U.S.C. Section 3013, and shall immediately notify the probation officer of any change in your economic circumstances that might affect your ability to pay a special assessment, fine, restitution, or co-payments ordered by the Court.

If the judgment imposed a fine or a restitution obligation, it shall be a condition of supervision that you pay any

such fine or restitution that remains unpaid at the commencement of the term of supervision in accordance with any Schedule of Payments set forth in the Criminal Monetary Penalties sheet of the judgment. In any case, the defendant shall cooperate with the probation officer in meeting any financial obligations.

Revocation of probation is mandatory for refusal to comply with drug testing imposed as a condition of supervision. 18 U.S.C. Sections 3565(b)(3) and 3583(g)(3) (MANDATORY DRUG TESTING IS WAIVED)

STANDARD CONDITIONS OF PROBATION

It is the order of the Court that you shall comply with the following standard conditions:

- 1) the defendant shall not leave the judicial district or other specified geographical area without the permission of the court or probation officer;
- 2) You shall report to the probation officer as directed by the court or probation officer, and shall submit a truthful and complete written report within the first five days of each month;
- 3) You shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) You shall support your dependents and meet other family responsibilities, including but not limited to, compliance with the terms of any court order or administrative process pursuant to the laws of a state, the District of Columbia, or any other possession or territory of the United States, requiring payment by you for the support and maintenance of any child or of a child and the parent with whom the child is living;

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- 5) You shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) You shall notify the probation officer ten (10) days prior to any change in residence or employment;
- 7) You shall consume no alcohol if sentenced to the special condition that you are to participate in a drug/alcohol program;
- 8) You shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substance, except as prescribed by a physician;
- 9) You shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 10) You shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
- 11) You shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
- 12) You shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer;
- 13) You shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
- 14) You shall notify third parties of risks related to your criminal record, personal history, or characteristics,

and shall permit the probation officer to make such notifications and/or confirm your compliance with this notification requirement.

SPECIAL CONDITIONS OF PROBATION

While the defendant is on probation pursuant to this Judgment:

- 1) THE DEFENDANT shall comply with the rules and regulations of the Immigration and Naturalization Service (INS) and, if deported from this country, either voluntarily or involuntarily, not reenter the United States illegally. Upon reentry into the United States during the period of Court ordered supervision, the defendant shall report to the nearest U.S. Probation Office within 72 hours;
- 2) THE DEFENDANT SHALL, PROVIDE the probation officer access to any requested financial information;
- 3) THE DEFENDANT SHALL NOT OPEN any new lines of credit and/or incur new debt without the prior permission of the probation officer;
- 4) THE DEFENDANT SHALL NOT POSSESS any identification documents which are not legally issued to him;
- 5) THE DEFENDANT SHALL PAY ANY FINE that is imposed by this judgment as directed by the Probation Officer; and
- 6) IT IS FURTHER ORDERED THAT DEFENDANT SHALL PAY a special assessment of \$25.00 which shall be due immediately, as previously stated on page 1 of this Judgment.

FINE

The defendant shall pay a fine of \$3000.00.

This fine is due and payable immediately.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report except.

Guideline Range Determined by the Court:

Total Offense Level:	6
Criminal History Category:	1
Imprisonment Range:	0 months to 6 months
Supervised Release Range:	24 months
Fine Range:	\$500 to \$5000
Restitution:	\$0

The court finds that there is no victim of defendant's criminal conduct and consequently no restitution is ordered.

The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.
